1958

# Erwin Motzkus and Lucille Motzkus v. Marvin Carroll and Elva Dween Carroll et al : Brief of Appellants in Answer to Petition for Rehearing and Brief of Respondents Motzkus

Utah Supreme Court



N. H. Tanner; James A. Stump; Attorneys for Appellants;

Case No. 8706

# IN THE SUPREME COURT of the STATE OF UTAH



ERWIN MOTZKUS and LUCILLE MOTZKUS, his wife,

*Repondents and Plaintiffs,*

—vs.—

MARVIN CARROLL and ELVA DWEEN CARROLL, his wife, and MRS. RUTH KEMPTON,

*Appellants and Defendants,*

and

ZIONS SAVINGS BANK & TRUST COMPANY, trustee for Carl M. Hansen,

*Respondent and Defendant.*

## BRIEF OF APPELLANTS IN ANSWER TO PETITION FOR REHEARING AND BRIEF OF RESPONDENTS MOTZKUS

N. H. TANNER,
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### STATEMENT

While the appellants are of the opinion that the petition for rehearing of the respondents Motzkus is destitute of merit, yet they shall touch briefly on the points raised therein and in the brief.

## ARGUMENT

### POINT I.

THE SUPREME COURT DID NOT ERR IN APPARENTLY VESTING TITLE, OR IN VESTING TITLE, TO THE STRIP OF LAND BETWEEN THE CENTER LINE OF THE OLD FENCE AND THE MOTZKUS NORTH SURVEYED LINE OF THE KEMPTON AND CARROLL TRACT.

Point A of the Motzkus petition and brief refers to the north surveyed line of the Kempton and Carroll tract and to the south surveyed line, the distance between them being 57.77 feet. There was no south surveyed line of the Kempton and Carroll tract. The south line of the Kempton and Carroll tract is an old fence, the existence of which was clearly established. Cecilia L. Springman testified as to that fence (Record, pages 114, 115). Marvin Carroll testified as to it (Record, pages 132, 133, 141). There was no evidence to the contrary. Mr. Carroll also testified to making measurements more than once at different places between the two old fences, the one on the north and the one on the south, the last measurement being made the day before the trial in District Court (Record, page 132), and the distance between the two fences was within an inch or two of the distance called for in the deed for the property. The Carrolls bought the property extending from fence to fence (Record, pages 148, 149). The appellants do not claim anything south of the old fence on the south. Such a contention as petitioners for rehearing make would put appellants over on the Springman property approximately four feet, and the Springmans over on the Cox property, next tract

south of Springmans, approximately four feet, and so on down the street. This is the very situation that the doctrine of boundary by acquiescence has been repeatedly enunciated by this court to avoid. It is "a rule of repose with a view of quieting titles," *Holmes* v. *Judge,* 31 Utah 269, 281, and, as stated by Mr. Justice Wade in the opinion in *Ekberg et ux* v. *Bates,* 121 Utah, page 123:

> "the doctrine of boundary by acquiescence rests on sound public policy of avoiding trouble and litigation over boundaries."

The appellants didn't gain approximately four feet of land by this court's decision, the decision adjudged what they owned and what they and their predecessors in interest had used and occupied for many years. The title to the four foot strip is no doubt vested in appellants. But whether or not it is is a matter for appellants to consider, not respondent Motzkus. The court's decision fixes the center line of the old fence as the south boundary of the Hansen and Motzkus tract, and that settles it. The Bank, as trustee, and the respondents Motzkus have no interest south of that line. There is, therefore, no merit whatever in Point A of the Motzkus brief.

## POINT II.

### THE SUPREME COURT DID NOT ERR IN APPLYING THE LAW OF THE CASES OF *BROWN V. MILLINER* AND *TRIPP V. BAGLEY* IN ITS DECISION.

The law of the cases of *Brown* v. *Milliner* and *Tripp* v. *Bagley* followed long established precedent. This court, in paragraph (1) of its opinion, says:

> "A careful study of the evidence clearly shows that there is no substantial dispute on the facts of whether a boundary line by acquiescence has been established. The evidence is clear, positive and not in dispute that for more than 45 years prior to the trial and until the Kesler survey was made in 1953, that there was a fence between the two tracts, etc.".

What was stated by Mr. Justice Frick in his opinion in *Holmes* v. *Judge,* 31 Utah, at page 281, as follows, clearly applies:

> "still where, as in this case, respecting the acquiescence for so many years, and the open and visible boundary is so clearly established, and the knowledge thereof by interested parties is so clearly shown, the general principles recognized by *all* authorities apply with full force, and we cannot do otherwise than to give them effect."

And, continuing further in the same paragraph he states:

> "But in *all* cases where the boundary is open and visibly marked by monuments, fences or buildings, and is knowingly acquiesced in for a long term of years, the law will imply an agreement fixing the boundary as located, and will not permit the parties or their grantees to depart from such line."

With the facts as set forth in paragraph (1) of this court's opinion, and as clearly proved as shown by the record herein, and with the law so clearly enunciated in the case of *Holmes* v. *Judge,* as well as in many cases following, how can there be any merit in Point B of the

Motzkus brief on petition for rehearing? This court did not err in its decision.

It is to be noted that respondent Zions Savings Bank & Trust Company, as Trustee, in its petition for rehearing and brief in support thereof, does not question the decision of this court on the points raised in the Motzkus petition and brief.

## CONCLUSION

In conclusion we assert:

1. That there isn't the slightest merit in the Motzkus petition for rehearing and in Points A and B of the brief.

2. That this court did not err, that its decision is supported by the record and by many precedents.

3. That the Motzkus petition for rehearing should be denied.

Respectfully submitted,

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